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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALEJANDRO ESCOBAR, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	D073141 (Super. Ct. No. 37-2016-00020327-CU-OE-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

Grady & Associates, Dennis M. Grady and Kostos Moros, for Plaintiff and Appellant.

Paul, Plevin, Sullivan & Connaughton LLP, Sandra L. McDonough and Evan Alexander Peña for Defendant and Respondent.

Alejandro Escobar, an employee in the Pharmacology department of the University of California, San Diego (UCSD) School of Medicine sued the university alleging several causes of action under the California Fair Employment and Housing Act

(Gov. Code § 12900 et seq., FEHA), including disability discrimination and failure to accommodate, as well as retaliation and violations of Labor Code section 1102.5 and the California Family Rights Act (CFRA). The superior court entered judgment for the university after granting its motion for summary judgment. Escobar appeals the judgment. We affirm.

BACKGROUND AND PROCEDURAL FACTS

A. *Employment History and Work Environment*

Escobar began working for the Pharmacology department in the UCSD School of Medicine in October 2007. From mid-2008 until he was discharged December 23, 2014, Escobar was the only IT professional in the department. He set up new computers, serviced computers, managed the e-mail system, and secured the Pharmacology department's network.

In late 2008, while Escobar was socializing with employees in Dr. Joanne Trejo's lab, Dr. Trejo told Escobar he should get an "inflatable Chris doll" to keep him company, a comment which Escobar interpreted as sexual in nature. Just before Escobar reported the comment to Janean Thompson, the human resources officer/operations manager, Dr. Trejo complained to Thompson that Escobar's socializing had been distracting the lab employees from their research. Dr. Trejo had asked Escobar to stop socializing with the lab employees previously.

Sometime in 2013 or 2014, Escobar told Thompson that he was being required by the head of the Pharmacology department to use UCSD property for an outside person and asked what he should do about it. Thompson told him to do whatever he was asked.

Escobar remembers repeating these concerns to Elena Dalcourt, a complaint resolution officer in the Office for the Prevention of Harassment and Discrimination (OPHD), in 2014 as well. He did not include this concern in the written complaints he filed with OPHD that year.

On March 7, 2014, Escobar complained to the department chair, Joan Heller Brown, that Dr. Trejo's and others' use of the School of Medicine's centralized IT department (SOM IT) for services Escobar could provide was abusive treatment, and he expressed concern that he was "losing [his] department." Heller Brown disagreed because the Dean of the School of Medicine was encouraging the use of the SOM IT services as part of its IT centralization efforts.

On March 10, 2014, Escobar submitted a complaint to the OPHD, in which he stated that in 2008 Dr. Trejo told him he should get an inflatable homosexual doll, and that she discouraged other employees from interacting with him. Dalcourt investigated Escobar's allegations, and, in July 2014, she completed a formal report regarding Escobar's sexual harassment claims, as well as additional claims he raised regarding discrimination and retaliation. Her report concluded there had been no violation of the university's nondiscrimination policy or its policy on sexual harassment.

B. *Escobar's Medical Leaves of Absence*

In 2012, Escobar requested and was granted a five-week medical leave of absence, from March 15 to April 23, for surgery on his neck. While Escobar was on this leave, there was a flood in the Pharmacology department, and the server and other computer equipment was moved to avoid water damage. The day after he returned home from

surgery, Thompson contacted Escobar because she was unable to restart the systems. Thompson drove Escobar into the office to assist with rebooting computers, a process which took approximately two to three hours, including travel.

Escobar took a second medical leave of absence from November 6, 2013 to January 1, 2014, for surgery. When he returned to work, he had physical restrictions that prohibited him from bending, crouching, or lifting. These were communicated to the university in writing from his doctor. In the months following the leave of absence, Escobar continued to take time off to receive injections in his back on five to ten occasions. Around this time, people within the Pharmacology department teased Escobar for being disabled; even Thompson, who was his direct supervisor, called Escobar her "handicapper" at least once.

Escobar took a third medical leave of absence from March 12 to 31, 2014. Then, on June 23, 2014, Escobar did not appear for work. Thompson reached out to him because he had not requested time off, and Escobar subsequently submitted a form from his doctor stating he was unable to work until further notice. This fourth medical leave of absence lasted from June 23, 2014 until December 1, 2014.

When Escobar returned to work on December 1, 2014, he supplied a "Return to Work Certification" signed by his doctor that included no restrictions. Escobar told Thompson that his doctor had recommended work restrictions, and Escobar testified at his deposition that he had the same restrictions as before, except that he was also to take multiple breaks during the day, which he did. Thompson asked him to get her

information from his doctor about work restrictions, but Escobar never provided that information to the university.

C. *School of Medicine Centralization of IT Services*

In December 2012, the associate vice chancellor for health sciences informed leaders in the Pharmacology department that it was going to begin consolidating IT services into the School of Medicine (SOM IT), a process it had begun discussing eighteen months earlier. In January 2014, the SOM IT office began offering services to the Pharmacology department, and department members began using its services.

In June 2014, the month Escobar began his fourth medical leave, the dean's office informed the Pharmacology department, including Wei Deng, the business officer, that it would begin charging each department a flat, mandatory fee for SOM IT services based on department headcount, but services would be at no cost to the departments from February 2015 through June 2016. The Pharmacology department paid Escobar's salary, but it had been recouping some of the cost by charging individual faculty and staff members from their budgets for the work Escobar did for them.

As department members used Escobar's services less, the reimbursements from their budgets covered less of his salary, and it became more expensive for the department to retain him. If the Pharmacology department retained Escobar, it would have to pay his salary as well as the mandatory SOM IT fee. At least one other department had already laid off its sole IT professional during Summer 2014. Thus, Heller Brown, Thompson, and Deng decided to terminate Escobar's employment. Escobar was discharged on December 23, 2014.

Following his termination of employment, Escobar "applied for numerous positions" at the university, and he alleges he was well-qualified for each of them. He had one interview, for a position with Academic Services, but he was told he was over-qualified for that position, and he was not selected for any of the positions for which he applied.

D. *Procedural Facts*

In November 2015, Escobar filed a request with the Department of Fair Employment and Housing for a right-to-sue letter. He filed his complaint in June 2016. The university filed a motion for summary judgment in June 2017, which the trial court granted. A judgment of dismissal was entered in January 2018.

DISCUSSION

A. *Standard of Review*

Summary judgment is proper when there is no triable issue of any material fact, and the moving party is entitled to judgment as a matter of law. (Code of Civ. Proc.,[1] § 437c, subd. (c); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67 (*Morgan*).) If the defendant is the moving party, it bears the burden of proving at least one element of the plaintiff's cause of action cannot be established or showing there is a complete defense. (§ 437c, subd. (o)(1), (2); *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 72 (*Green*); *Morgan,* at p. 67.) Once the defendant meets its burden, the burden shifts to the plaintiff to show a triable issue of fact exists. (*Morgan*, at p. 67.)

We review a court's decision to grant summary judgment de novo. (*Green, supra,* 19 Cal.4th at p. 72.) "Because this case comes before us after the trial court granted a motion for summary judgment, we consider the evidence in the record before the trial court when it ruled on the motion. We liberally construe the evidence in support of the party opposing summary judgment [citation], and assess whether the evidence would, if credited, permit the trier of fact to find in favor of the party opposing summary judgment under applicable legal standards." (*Loggins v. Kaiser Permanente Intern.* (2007) 151 Cal.App.4th 1102, 1109 (*Loggins*).)

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1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

B. *Claim for Violation of Labor Code Section 1102.5*

On appeal, Escobar contends his termination of employment violated public policy because it was retaliation for him expressing concern about the legality of working on UCSD equipment in department members' homes and shipping UCSD equipment to department members' families. We disagree.

Labor Code section 1102.5, subdivision (b) prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency when the employee reasonably believes the information discloses a violation of state or federal statute, rule, or regulation. An employee can prove such a claim through direct or circumstantial evidence. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138 (*Mokler*).) When the employee uses circumstantial evidence, he must establish a prima facie case of retaliation. (*Ibid.*)

Under the first stage of this analysis, the plaintiff must show (1) he was engaged in a protected activity; (2) he was subjected to an adverse employment action; and (3) there was a causal link between the protected activity and the adverse action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.) Once a plaintiff makes a prima facie case, a defendant can defend against a retaliation claim by showing there is a legitimate business reason for the action. (*Ibid.*) If the employer produces evidence of its legitimate business reason, the burden shifts back to the employee to provide substantial evidence that the employer's proffered reasons are pretextual. (*Loggins, supra*, 151 Cal.App.4th at p. 1109.)

The trial court ruled that Escobar's evidence was insufficient to establish a prima facie showing of retaliation because there was no triable issue either on the first element (whether he engaged in protected activity) or the third element (whether there was a causal link between the protected activity and the adverse employment action). Escobar contends there is at least a material question of fact as to the first and third elements. He also contends there was sufficient material evidence in dispute to demonstrate pretext for his discharge. We disagree with each of his contentions, and we address them in turn.

1. Public Policy

A termination of employment is actionable against public policy if it violates a policy that is identified in statutory or constitutional provisions, public because it inures to the benefit of the public and not just an individual, well-established at the time the employee is discharged, and the policy is substantial and fundamental. (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 901-902.) Additionally, the employee must identify the fundamental policy expressed in the statute. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1257.) Thus, the employee must be able to point to some statute, rule, or regulation that served as the foundation of his suspicion. (See *ibid* ["failure to identify a statutory or constitutional policy that would be thwarted by . . . discharge dooms his cause of action"]; see *Green, supra,* 19 Cal.4th at pp. 71-72 [statutorily authorized regulations that effectuate the Legislature's purpose are subject to *Tameny* claims because they are "tethered to" statutory provisions]; *Stevenson,* at pp. 889-890 [policy must be supported by either constitutional or statutory provisions].)

Escobar did not identify any fundamental policy expressed by statute or even identify any statutes, rules, or regulations that could have served as a foundation for his suspicions of unlawful activity;[2] thus, he could not meet his burden for demonstrating his statements were a protected activity.

2. Causal Link

Moreover, even assuming Escobar's comments about UCSD equipment usage outside of the university qualified as protected activity, his claim fails because the evidence does not show a causal link between his statements and his discharge. A plaintiff can demonstrate an employer's retaliatory motive by showing he engaged in a protected activity, the employer was aware of the activity, and employment termination occurred shortly thereafter. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614-615.)

Although the evidence supports Escobar's allegation that Thompson was involved in the decision to terminate his employment (see *Morgan, supra*, 88 Cal.App.4th at p. 70), there is no temporal relationship between his statements to Thompson or his statements to Dalcourt and the decision to terminate employment. Escobar testified in his

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[2] On appeal, Escobar identifies two possible statutes in a footnote: one regarding conversion of federal property (18 U.S.C. § 641) and the other regarding embezzlement (Pen. Code, § 504). The university noted in response that Escobar, as an IT professional, could not have reasonably believed his work violated any law because working remotely is common, and professors may need to access their work systems or networks while traveling or on sabbatical. (*Mokler, supra*, 57 Cal.App.4th at p. 138 [suspicions must be reasonably based].) None of this information was before the trial court, and we are limited to the arguments and evidence before that court on appeal. (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11 [arguments not raised in trial court are waived].)

deposition that he had complained about working on computers off-site and for UCSD family members before March 2014 to Thompson, but his termination of employment was not until December 23, 2014.[3] This lapse of more than nine months is too far removed to establish an inference of causation.[4] Even if it were sufficiently close in time, temporal proximity only satisfies the initial burden, shifting the burden to the employer to offer a legitimate reason for an adverse employment action. (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 388 (*McRae*).)

3. Legitimate Business Reason & Pretext

The university offered a legitimate reason for its termination of Escobar's employment: the centralization of IT services. At this point, "[t]he plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. [Citation.] In responding to the employer's showing of a legitimate reason for the

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[3] Escobar's allegation that he also expressed concern to Dalcourt that working on personal computers and sending department members UCSD equipment does not separately support his claim because Dalcourt did not participate in the decision-making and because the evidence does not support this allegation beyond his own statement in deposition. (*Morgan, supra,* 88 Cal.App.4th at p. 70 [must show employer knowledge for causal link].) His written complaints to OPHD did not mention this concern. Even had Escobar told Dalcourt about his concerns, her report from the investigation did not convey them to the decision-makers.

[4] It is unclear from Escobar's deposition testimony when he made the comments to Thompson; he stated that he told Thompson about using UCSD property for an outside person "[w]hen it was happening," but he did not specify the year. Even liberally construing the evidence as we must (*Loggins, supra,* 151 Cal.App.4th at p. 1109), the record indicates the complaints to Thompson were made before he subsequently discussed his formal complaint with Dalcourt, a process which began in March 2014.

complained-of action, the plaintiff cannot ' "simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [. . . asserted] non-discriminatory reasons.' " ' " ' " (*McRae, supra*, 142 Cal.App.4th at pp. 388-389.) "Circumstantial evidence of ' "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate' on an improper basis." (*Morgan, supra*, 88 Cal.App.4th at p. 69.)

The university provided unrefuted evidence that the School of Medicine began centralizing its IT department in 2012, and Escobar's continued employment was becoming too expensive to justify. Evidence that the Pharmacology department would have had to pay his salary as well as a mandatory, flat SOM IT fee per person, coupled with undisputed evidence that another department took similar action is strong evidence of a legitimate business reason for Escobar's discharge. Thus, the burden shifts to Escobar to provide specific, substantial evidence of pretext. (See *Loggins, supra*, 151 Cal.App.4th at p. 1109.)

Escobar contends that the university made no attempt to place him in another position at UCSD, which he argues is evidence of pretext. Escobar testified that he contacted a lot of people at UCSD to ask if there were IT positions available, and he applied for many positions. However, he never states his qualifications, the titles of the

positions for which he applied, how many positions he applied for, or why he was qualified for those particular jobs. He also failed to explain why a decision that he was over-qualified for a job by decision-makers in the Academic Services department is evidence that the decision by different decision-makers in the Pharmacology department to eliminate his position was not legitimate. Accordingly, Escobar failed to raise material issues of fact with respect to his retaliation claims.[5]

C. *Claims for Failure to Accommodate*

Escobar contends the trial court erred by failing to consider evidence that he was required to come into work while on medical leave immediately following surgery in 2012, that Thompson and other co-workers made jokes about his disability in 2013, and that the university knew of Escobar's work restrictions when he returned to work in December 2014.

As an initial matter, the first two items of evidence Escobar identifies—returning to the office following neck surgery in 2012 and being subjected to coworkers' jokes about his disability—both occurred outside the applicable statute of limitations. An employee is bound by a one-year statute of limitations for employment-related claims. (Gov. Code, § 12960, subd. (d); *Morgan*, *supra*, 88 Cal.App.4th at pp. 63-64.) Escobar filed his request for a right-to-sue letter with the Department of Fair Employment and Housing in November 2015, more than three years after the alleged failure to

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[5] Escobar does not challenge the trial court's dismissal of his first, fourth, fifth, and eighth causes of action resulting from its conclusion that the university had a legitimate reason for eliminating Escobar's position. Escobar previously conceded his seventh cause of action for violation of Labor Code section 232.5 was without merit.

accommodate occurred in March and April 2012 and more than two years after his coworkers made jokes in 2013. Because these allegations are time-barred, they cannot properly serve as the basis for his failure-to-accommodate claims.[6]

Escobar's remaining claim is that the university knew of his restrictions when he returned to work in December 2014 but failed to accommodate him. The trial court directly addressed this allegation in its minute order, and we agree with the court's assessment.

To prove a failure to accommodate a disability, a plaintiff must show he is a qualified individual who initiated the interactive process and kept his employer appraised of restrictions, and the employer failed to reasonably accommodate him. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1013.) Failure to reasonably accommodate can be established by demonstrating a necessary accommodation was obvious but not provided, the employee requested a specific, available accommodation that the employer refused to provide, or the employer engaged in the interactive process and identified a reasonable accommodation but refused to provide it. (*Id.* at p. 1016; Gov. Code, § 12940, subd. (m).) Nothing in the record suggests any of this occurred.

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6 Even were the jokes within the applicable time limit, Escobar fails to explain how these comments support a claim for failure to accommodate a disability. An appellant is required to present cognizable legal arguments in support of a reversal of the judgment; when he fails to do so, we may deem the argument abandoned. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99 [issues not supported by argument or citation to authority are waived].) "Further, an appellant is required to explain the relevance of facts cited in his or her brief." (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 600.)

"The interactive process of fashioning an appropriate accommodation lies primarily with the employee." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1384.) It is the employee's responsibility to present the employer with a list of restrictions at the earliest opportunity. (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 443.) In this case, Escobar presented the university with a "Return to Work Certification" form signed by his doctor that included no specific restrictions. Although he told his supervisor that his doctor had recommended work restrictions when she asked, nothing in the record suggests he identified what those work restrictions were, or provided that information to the university, even though his supervisor requested information. "An employee cannot demand clairvoyance of his employer," or expect the employer to know he wanted a particular accommodation, then sue for not providing it. (*Id.* at p. 443.)

Moreover, Escobar offers no evidence that the university failed to accommodate his disability upon his return. Indeed, the evidence contradicts that claim; Escobar testified in his deposition the restrictions were the "same [restrictions] as before, except take multiple breaks during the day. . . . If you feel fatigued, sit down, take a break, stretch. And I would." Thus, the university cannot be said to have failed to accommodate Escobar.[7]

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[7] Escobar contends the failure to accommodate his disability is demonstrated by the termination of employment on December 23, 2014. Any such failure to accommodate is obviated by the university's legitimate business reason for eliminating Escobar's position, as discussed *ante*.

DISPOSITION

The judgment is affirmed. Appellants are to bear costs on appeal.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

GUERRERO, J.